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ST & ANOR v. PENDAFTAR BESAR KELAHIRAN DAN KEMATIAN MALAYSIA & ORS

HIGH COURT MALAYA, KUALA LUMPUR
AMARJEET SINGH SERJIT SINGH J
[JUDICIAL REVIEW NO: WA-25-574-11-2022]
7 DECEMBER 2023

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Abstract – *The registration of a birth is crucial as the particulars of the birth would determine whether a newborn in Malaysia is a citizen. The instant application for judicial review brings into focus the acquisition and termination of citizenship which is housed in Chapter II of Part III of the Federal Constitution ('FC'), arts. 23 and 28A of the FC and written laws in relation to the registration of births and deaths, ie, the Births and Deaths Registration Act 1957 ('BDRA') and the issuance of birth certificates governed by the BDRA.*

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ADMINISTRATIVE LAW: *Judicial review – Application for – Judicial review against decision of Registrar General of Births and Deaths ('Registrar General') – Malaysian husband and wife adopted child and registered child at National Registration Department – Husband and wife stated in application that they were biological parents of child – Child stated as 'citizen' in first birth certificate – Fact that child was adopted discovered when child applied for MyKad 12 years later – Information in first birth certificate corrected – Second birth certificate issued and child stated as 'non-citizen' – Powers of Registrar General – Whether Registrar General had power to terminate citizenship of person – Whether Registrar General failed to take into account that child was citizen by operation of law – Births and Deaths Registration Act 1957, s. 27*

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CONSTITUTIONAL LAW: *Citizenship – Citizenship by operation of law – Malaysian husband and wife adopted child and registered child at National Registration Department – Husband and wife stated in application that they were biological parents of child – Child stated as 'citizen' in first birth certificate – Fact that child was adopted discovered when child applied for MyKad 12 years later – Information in first birth certificate corrected – Second birth certificate issued and child stated as 'non-citizen' – Whether child was citizen by operation of law pursuant to art. 14(1)(b), read with s. 1(a) and/or 1(e) of Part II of Second Schedule of Federal Constitution*

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This was a judicial review application for the following reliefs: (i) an order of *certiorari* to quash the decision of the Registrar General of Births and Deaths ('Registrar General') to issue a birth certificate for the second applicant ('child') stating that the child was a non-citizen; (ii) an order of *mandamus* compelling the respondents to issue a birth certificate and MyKad stating that the child was a citizen of Malaysia; (iii) a declaration that the child was a Malaysian citizen by operation of law pursuant to art. 14(1)(b),

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read with s. 1(a) and/or 1(e) of Part II of the Second Schedule of the Federal Constitution ('FC'); and (iv) a declaration that the respondents had violated the child's fundamental rights provided under the FC and other relevant laws. The first applicant was married to SS in 1988 but was not blessed with any children. In 2005, he was informed by one Dr Shanmugam that there was a child born and abandoned by his biological mother at his clinic. The first applicant and SS went to the clinic and upon seeing the child, decided to adopt the same. The first applicant and SS then submitted an application for registration of birth of the child at the National Registration Department. In the application, it was stated that the first applicant and SS, who were Malaysian citizens, were the biological parents of the child. The NRD issued a birth certificate in respect of the child and the child's nationality was stated as 'citizen' ('first birth certificate'). In 2017, when the child had attained the age of 12 years, the first applicant and SS went to the NRD again to apply for a MyKad for the child. The officer on duty observed that the child's face and skin colour had no similarities to SS. They were later called to attend an investigation into the application and the first birth certificate. After some time, the first applicant confessed that he and SS were not the biological parents of the child. Upon the advice of the NRD officers, the first applicant made an application to correct the information provided to obtain the first birth certificate. The application was allowed and a new birth certificate was issued in respect of the child ('second birth certificate'). The second birth certificate, however, stated the child as a 'non-citizen' since the particulars of the biological parents were stated as 'no information obtained'. Hence, the instant application. The applicant contended that the Registrar General: (i) had no power to terminate the citizenship of a person under s. 27 of the Births and Deaths Registration Act 1957 ('BDRA'). Termination of citizenship could only be made under Chapter II of Part III of the FC and there was no provision in the said chapter that allowed the termination of citizenship which was conferred by operation of law; and (ii) failed to take into account factors that established the child a citizen by operation of law under art. 14(1)(b) read with s. 1(a) and/or 1(e) of Part II of the Second Schedule of the FC.

Held (dismissing application):

(1) There was no error of law committed by the Registrar General. The Registrar General did not terminate the citizenship of the child. What the Registrar General did was to correct the particulars of the child in the Register of Births after an application to correct the particulars was made under s. 27 of the BDRA. The particulars of the parents that were given by the first applicant when registering the birth of the child was false as the first applicant and SS, who were citizens, were stated as the parents of the child when they were obviously not. The false particulars without more would immediately establish the child a citizen by operation of law under art. 14(1)(b) read with s. 1(a) of Part II of the

Second Schedule of the FC. When the particulars in the Register of Births were corrected, the first birth certificate, which did not reflect the particulars on the Register of Births, had to be changed. The child was stated as a 'non-citizen' as there was no information on the biological parents of the child. (paras 16 & 17)

(2) The issuance of birth certificates is provided for under s. 14 of the BDRA. The issuance of a birth certificate is only provided under the BDRA and nowhere else – not even in the FC. The action of the Registrar General was solely under the BDRA which provided for registration of births. It was the function of the Registrar General to issue a birth certificate. The issue of termination of citizenship was a non-starter and did not arise at all. The action to amend the status of citizenship was made under s. 27(3A) of the BDRA after an inquiry was held under s. 37B(1) of the BDRA. The Registrar General was acting within his powers conferred upon him to maintain a Register of Births and to issue a certificate of birth based on correct particulars of the parents of the child. The Registrar General would be in dereliction of his function to issue a birth certificate with the status 'citizen' when the qualifications of citizenship by operation of law were not fulfilled. (paras 32-34)

(3) The applicants must first show that the child was abandoned at the clinic. Once the fact of abandonment is established by the applicants, only then does the burden shift to the Registrar General to rebut the presumption that had arisen, *ie*, the child was not born of a mother permanently resident at the place where the newborn child was found. The applicants however failed to clear the threshold by failing to show that the child was found abandoned at the clinic for the presumption to arise. It was clear that the first applicant or SS had no knowledge of the alleged abandonment except what was told to them by Dr Shanmugam. There was no affidavit filed by Dr Shanmugam who appeared to be the only person who could shed light on the biological mother of the child. Further, the clinic revealed that there were no records of the birth of the child as all records in the clinic had been destroyed in floods during investigations carried out by the NRD. (paras 39-41)

(4) The child would be a citizen by operation of law if the qualifications specified in s. 1(e) of Part II of the Second Schedule of the FC were fulfilled. Further, it is provided in s. 2(3) of Part II of the Second Schedule that 'For the purposes of para. (e) of s. 1, a person is to be treated as having at birth any citizenship which he acquired within one year afterwards by virtue of any provision corresponding with para. (c) of that section of otherwise.' The child however did not fulfil the qualifications or s. 1(e) read with s. 2(3) of Part II of the Second Schedule of the FC. (paras 48 & 49)

(5) It was not sufficient to refer to s. 2(3) of Part II of the Second Schedule to merely say that the child had no citizenship of any country one year from the date of the birth of the child. That was not the purpose of the section. All that s. 2(3) did was to treat a person as having any citizenship at the time of birth which citizenship was subsequently acquired within one year from the date of birth either through: (i) any provision corresponding with s. 1(c) of Part II of the Second Schedule of the FC; or (ii) some other means. Subsection 2(3) of s. 1 operated as a presumption as to the time of acquisition of citizenship and to treat any citizenship acquired within one year after birth as citizenship acquired at the time of the birth. Subsection 2(3) of s. 1 of Part II had no application in the instant case. (para 53)

Case(s) referred to:

CCH & Satu Lagi v. Pendaftar Besar Kelahiran Dan Kematian, Malaysia [2021] 10 CLJ 352 CA ***(refd)***

Lim Jen Hsian & Anor v. Ketua Pengarah Jabatan Pendaftaran Negara & Ors [2017] 8 CLJ 412 CA ***(refd)***

LKP & Anor v. Pendaftar Besar Kelahiran Dan Kematian, Malaysia [2023] 3 CLJ 243 HC ***(refd)***

Tan Soo Yin v. Registrar-General Of Births And Deaths, Malaysia (Civil Appeal W-01(A)-548-10-2020) (Unreported) ***(refd)***

Than Siew Beng & Anor v. Ketua Pengarah Jabatan Pendaftaran Negara & Ors [2017] 8 CLJ 16 CA ***(refd)***

Legislation referred to:

Births and Deaths Registration Act 1957, ss. 3(1), 4, 7, 8, 9, 14, 27(3), (3A), 37B(1), 39

Births and Deaths Registration Rules 2019, r. 3

Federal Constitution, arts. 14(1)(b), 15A, 16, 16A, 19, 19B, 23, 24, 25, 26, 27, 28A, Second Schedule Part II, ss. 1(a), 1(e), 2(3), 19B, Part III s. 10(a), 10(b), Ninth Schedule List I item 12(a)

For the applicants - N Surendran, Shahid Adli & Nabila Khairuddin; M/s Daim & Gamany

For the respondents - Nur Irmawatie Daud; SFC

Reported by Lina E

JUDGMENT

Amarjeet Singh Serjit Singh J:

Introduction

[1] On 2 October 2023, I dismissed the applicants' judicial review application for the following reliefs:

(i) an order of *certiorari* to quash the decision of the Registrar General of Births and Deaths ("Registrar General") to issue a birth certificate for the second applicant ("the child") which was extracted on 19 August 2022 stating that the child is a non-citizen ("the impugned decision");

(ii) an order of *mandamus* compelling the respondents to issue a birth certificate and MyKad stating that the child is a citizen of Malaysia;

(iii) a declaration that the child is a citizen by operation of law pursuant to art. 14(1)(b) read with s. 1(a) and/or 1(e) of Part II of the Second Schedule of the Federal Constitution; and

(iv) a declaration that the respondents had violated the child's fundamental right provided under the Federal Constitution and other relevant laws.

[2] I have redacted the names of the applicants to maintain anonymity. Also, for the sake of brevity, unless otherwise stated, all references in this judgment to "articles" and "Second Schedule" are to that of the Federal Constitution. Similarly, and unless otherwise stated, any references to Part II or Part III are to that of the Second Schedule of the Federal Constitution.

The Applicants' Case

[3] The salient facts of the applicants' case are gleaned from the affidavit verifying facts affirmed by the first applicant. The first applicant averred that he was married to SS since 23 August 1988 but was not blessed with any children. On 21 August 2005, he was informed by one Dr Shanmugam from Shan Clinic & Maternity Centre, Bayu Perdana, Klang ("Shan Clinic & Maternity Centre") that there was a child born and abandoned by his biological mother at the said clinic. He was told that the biological mother was a single parent. On 23 August 2005, the first applicant and SS attended Shan Clinic & Maternity Centre and upon seeing the child decided to adopt the same.

[4] The first applicant averred that Dr Shanmugam had given him a letter confirming the birth of the child and told him to register the birth of the child at the National Registration Department. The letter stated that he and SS were the biological parents of the child which is obviously a lie. On 25 August 2005, the first applicant and SS submitted an application for registration of birth of the child at the National Registration Department. In the application *ie*, Form JPN LM01 it was stated that the first applicant and SS, who were Malaysian citizens, were stated as the biological parents of the child. Based on this letter, the National Registration Department issued a birth certificate in respect of the child. The nationality of the child was stated as "citizen" in the said birth certificate issued on 25 August 2005 ("the first birth certificate"). This is again obvious as the parents of the child was stated as citizen.

[5] On 25 August 2017, when the child had attained the age of 12 years, first applicant and SS went to the National Registration Department to apply for a MyKad for the child. However, on 6 July 2017, they were called to attend an investigation into the application and the first birth certificate. After some time, the first applicant confessed that he and SS were not the

biological parents of the child. The first applicant and SS were then allegedly advised by the officers of the National Registration Department to correct the false information that they were parents of the child.

[6] An application was made to correct the false information provided to obtain the first birth certificate. The application was allowed. On 14 September 2021, a new birth certificate was issued in respect of the child ("the second birth certificate"). The second birth certificate stated the status of citizenship of the child as a "non-citizen" since the particulars of the biological parents were stated as "no information obtained". As a result, the applicants filed the instant application for judicial review.

The Respondents' Reply

[7] It was averred that the first applicant had declared in Form JPN LM01, the official form for registration of birth, that he and Sheila, both who are Malaysian citizens, are the parents of the child who was born in Shan Clinic & Maternity Centre on 18 August 2005. The attending doctor was stated as Dr Shanmugam. The first applicant had made a declaration in the said form that all the information given was correct and true. On the information given by the first applicant, the birth of the child was registered in the register and the first birth certificate issued. The child was classified as a citizen in the register on the basis that the first applicant and SS were citizens of Malaysia. This is the natural consequence of art. 14(1)(b) read with s. 1(a) of Part II of the Second Schedule based on the information given by the first applicant in Form JPN LM01 to the National Registration Department. The duty of the National Registration Department was to register the child as a Malaysian citizen based on such information. The information given by the first applicant was clearly not true as he and SS were not the biological parents of the child. So, the citizenship of the applicant was obtained by a lie by the first applicant.

[8] It was averred on behalf of the respondents that when the child attained the age of 12 years in 2017, SS brought the child to the National Registration Department to apply for the child's MyKad as required by law. At this time, it was observed by the officer on duty that the child's face and skin colour had no similarities to SS. An investigation was carried out by the National Registration Department to investigate the matter. The investigation at Shan Clinic & Maternity Centre was of no avail as the National Registration Department was informed by letter dated 23 December 2017 that its records were during floods.

[9] The National Registration Department then questioned the first applicant and SS and requested for a DNA test to be carried out to confirm biological lineage but there was no response. Eventually, on 2 September 2020, the first applicant and SS confessed that: (i) they were not the

biological parents of the child; (ii) that Dr Shanmugam gave the child to the them; and (iii) that they had no knowledge of who biological parents of the child were.

[10] The first applicant made a sworn statement dated 18 December 2020 to the following effect: (i) the child was not his biological son; (ii) that on 21 August 2005, he and SS were contacted by Dr Shanmugam informing of a newborn baby delivered by a single mother in his clinic; (iii) the child's mother had handed over the child to Dr Shanmugam; (iv) there was no information of the child's biological mother; (v) on 23 August 2005, both the first applicant and Sheila met Dr Shanmugam and decided to take the baby as their adopted child; and (vi) Dr Shanmugam prepared a confirmation letter of the child's birth and instructed them to register the child at the child's birth at the National Registration Department. On 23 December 2020, the first applicant and Sheila made a sworn statement to the same effect.

[11] By this time the first applicant had engaged solicitors *ie*, Messrs Daim & Gamany. In a letter dated 26 November 2021, the National Registration Department informed the status of the amendment of the child's particulars in the birth certificate and the requirement to submit other supporting documents to enable the amendment of the details in the register to be completed.

[12] A DNA report dated 7 February 2022 from the Chemistry Department confirmed that the first applicant and SS were not the biological parents of the child.

[13] It was averred that SS then submitted an application under s. 27(3) of the Births and Deaths Registration Act 1957 ("BDRA") to correct the particulars in the birth certificate. The application was allowed, and the register of births now showed that the particulars of the child's parents was stated as "information not known". A letter dated 10 August 2022 was then sent to the first applicant and SS were informed to collect the new birth certificate of the child based on the corrected information in the register of births ("the second birth certificate"). The second birth certificate now stated: (i) the particulars of the child's biological parents as "information not obtained"; and (ii) the child's citizenship status as "non-citizen".

[14] The correction from "citizen" to "non-citizen" was made pursuant to s. 27(3A) after an inquiry was held under s. 37B(1) of the BDRA. The inquiry revealed that: (i) the first applicant and SS were not the child's biological parents; (ii) the first appellant and SS did not have any knowledge of the child's biological mother; and (iii) that the records in the clinic where the child was born were allegedly destroyed in floods. Both the first applicant and SS were heard in the inquiry.

Grounds Of Review

[15] The grounds of review were that the impugned decision was tainted with illegality and/or irrationality. It was contended that the Registrar General had no power to terminate the citizenship of a person under s. 27 of the BDRA. Termination of citizenship can only be made under Chapter 2 of Part III of the Federal Constitution and there is no provision in the said Chapter that allows termination of citizenship which is conferred by operation of law. It was further contended that the Registrar General of Births and Deaths failed to take into accounts factors that established the child a citizen by operation of law *ie*, under art. 14(1)(b) read with s. 1(a) and/or 1(e) of Part II of the Second Schedule.

Analysis And Decision

[16] After considering the facts presented, the law and the submissions of the parties, I found that there was no error of law committed by the Registrar General. The Registrar General did not terminate the citizenship of the child. What the Registrar General did was to correct the particulars of the child in the register of births after an application to correct the particulars were made under s. 27 of the BDRA.

[17] The register of births is crucial as the particulars of birth would determine whether a new born in Malaysia is a citizen or otherwise. In the instant case, the particulars of the parents that were given by the first applicant when registering the birth of the child was false. The particulars were false as the first applicant and SS, who are citizens, were stated as the parents of the child when they were obviously not. The false particulars without more would immediately establish the child a citizen by operation of law under art. 14(1)(b) read with s. 1(a) of Part II of the Second Schedule. When the particulars in the register of births was corrected on an application made under s. 27 of the BDRA the first birth certificate which did not now reflect the particulars on the register of births had to be changed. The child was stated as a "non-citizen" as there was no information on the biological parents of the child.

[18] My reasons are as follows. The instant application for judicial review brings into focus the acquisition and termination of citizenship which is housed in Chapter 2 of Part III and the Federal Constitution, namely, arts. 23 to 28A, the written law relating to registration of births and deaths *ie*, the BDRA and the issuance of birth certificates governed by the BDRA.

Acquisition Of Citizenship

[19] Chapter 1 of Part III of the Federal Constitution provides for the acquisition of citizenship.

[20] The main categories for acquiring citizenship are:

(i) citizenship by operation of law provided under art. 14(1). Persons born after Malaysia Day who meet any of the qualifications specified in s. 1 of Part II of the Second Schedule are citizens. If any person qualifies, that person is a citizen without volition on his or her part and the Government including the Registrar General has no discretion in the matter;

(ii) citizenship by registration provided under arts. 15, 15A, 16 and 16A. Under this category, citizenship is granted to persons who are non-citizens by the Federal Government upon application. The non-citizen must satisfy the stipulated criteria to the satisfaction of the designated Minister. A register of citizens by registration is established and maintained by the Minister under s. 10(1)(a) of Part III of the Second Schedule; and

(iii) citizenship by naturalisation is provided under art. 19. Under this category non-citizens acquire citizenship by making an application to the Federal Government. The non-citizen must satisfy the criteria stipulated to the satisfaction of the designated Minister. A register of citizens by naturalisation is established and maintained by the Minister under s. 10(1)(b) of Part III of the Second Schedule.

Termination Of Citizenship

[21] Termination of citizenship is provided in Chapter 2 of Part III of the Federal Constitution either by the act of (i) voluntary renunciation of citizenship by a citizen under art. 23; (ii) deprivation of citizenship by an order of the Federal Government where a citizen has acquired or has exercised the rights of foreign citizenship under art. 24; and (iii) deprivation of citizenship by an order of the Federal Government of a person who has been granted citizenship by registration or naturalisation for reasons stated in arts. 25, 26 and 26A.

[22] Of importance is art. 27 which provides that before an order can be made by the Federal Government under arts. 24, 25 or 26 the citizen against whom the Federal Government intends to make an order of deprivation of citizenship must be accorded the right for his case to be referred to a committee of inquiry. At the conclusion of such inquiry the committee will submit a report to the Federal Government which is required to consider the report before making the order of deprivation.

The BDRA And The Role Of The Registrar General

[23] The Registrar-General is a creature of statute established under sub-s. 3(1) of the BDRA which read:

> The Yang Di-Pertuan Agong may appoint a public officer to be Registrar General of Births and Deaths for Malaysia, who shall be responsible for carrying out the provisions of this Act and shall have general charge and supervision of all registers and all indices and of all matters done or performed under this Act.

[24] It is important to bear in mind that the BDRA was enacted pursuant to the Ninth Schedule, List I (Federal List), specifically, item 12(a) of the Federal Constitution. The BDRA requires that a register of births and a register of deaths of all persons is to be kept and maintained by the Registrar General. One of the most important functions of the Registrar General is to issue a certificate of birth upon the registration of a newborn on information given by designated persons (informant of the birth) in the prescribed form *ie*, Form JPN LM01. The birth certificate that is issued contains the information that is stated in the register of births, such as, the particulars of the biological parents, if known, or if not known would state "information not available". The certificate of birth also contains the status of citizenship. The status is determined from the information given by the informant in Form JPN LM01 provided under the Births and Deaths Registration Rules 1958 ("BDRR 1958"). It would state "citizen" or "non-citizen" depending on whether the qualification for citizenship stipulated in art. 14(1)(b) read with s. 1 of Part II of the Second Schedule are met or not met. The information given by the informant is therefore of crucial importance.

[25] I begin with s. 39 of the BDRA. This is an enabling provision giving power to the designated Minister to make rules, amongst others, as to form and contents of the registers, certificates of birth, certificates of death, forms, certificates, notices and other documents required and the information to be supplied for carrying out the purposes of the BDRA. The specific prescription of particulars in the register is governed by the BDRR 1958 which has since been repealed and replaced by the Births and Deaths Registration Rules 2019 which came into force on 1 March 2019. For the purposes of the instant case the first applicant gave the information under the BDRR 1958 and Form JPN LM01 as it existed then.

[26] In ascertaining the scope of the Registrar General's powers, it is necessary to construe specific provisions of the BDRA within the context of the entire Act. Section 4 requires the Registrar General to keep and maintain registers of all births and deaths. Section 7 provides the entering into such register particulars of birth of a newborn child obtained from designated informants. The information required is to be given by way of Form JPN LM01 prescribed under r. 3 of the BDRR 1958 which provide as follows:

> The information to be given concerning the birth or still-birth of every child born in the Federation and the particulars to be entered in the register concerning such birth or still-birth shall be as set out in Form JPN.LM01, in the First Schedule hereto.

[27] Section 8 imposes a duty on the designated informants to register the birth of a newborn child within 60 days from the date of the birth in the manner already alluded to at the National Registration Department in the presence of the appropriate officer and to sign the register of births. Section 14 provides the Registrar General with the crucial function of issuing a birth certificate to the informant upon registering the birth of a newborn. In determining the status of citizenship to be recorded in the register of births, the Registrar General is guided by the information given by the informant and based on such information will decide on whether the qualifications for citizenship by operation of law are met or not met.

[28] In this regard, Parliament envisaged the situation where informants would make a mistake or provide incorrect or false information on the birth of the child and provided an avenue to subsequently correct such information on the register of births. A correction can be made on application and the manner to do so is provided by s. 27(3) of the BDRA which read as follows:

> *Any error of fact or substance in any register may be corrected by the Registrar General upon payment of the prescribed fee and upon production by the person requiring such error to be corrected of a statutory declaration setting forth the nature of the error and the true facts of the case,* and made by two persons required by this Act to give information concerning the birth, still-birth or death with reference to which the error has been made, or in default of such persons then by two credible persons having knowledge to the satisfaction of the Registrar General of the truth of the case; and the Registrar General may if he is satisfied of the facts stated in the statutory declaration cause such entry to be certified and the day and the month and the year when such correction is made to be added thereto.
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> (emphasis added)

[29] The Registrar General is conferred powers under s. 37B of the BDRA to hold an inquiry to satisfy himself of any particulars required for the purpose of making a decision. At the conclusion of the inquiry, the Registrar General is conferred power to correct any error of fact or substance in any register. In this regard, s. 27(3A) empowers the Registrar General to make corrections in the register of births in the following words:

> Where the Registrar-General, the Superintendent-Registrar or the Registrar is satisfied that from an inquiry held under Section 37B *an error of fact or substance in any register exists, the error of fact or substance may be corrected by the Registrar-General.* (emphasis added)

[30] The most common error that is corrected is the status of citizenship in the register. In such circumstances, the birth certificate is reissued by the Registrar General with the correct status of citizenship. This happens when the original information of the parents given by the informant turns out to be incorrect or false as happened in this case. The information had to be corrected to "information not available". In such cases, the status of

citizenship is thrown into doubt and has to be ascertained. This is done by the Registrar General holding an inquiry under s. 37B of the BDRA as was done in the instant case, to determine whether any qualification of citizenship by operation of law is or is not fulfilled. If the qualifications are not fulfilled, the Registrar General will register the child as a "non-citizen" and will reissue a certificate of birth with such status.

[31] The law reports are replete with cases where the status of citizenship is sought to be declared as "citizen" by operation of law instead of "non-citizen" as stated by the Registrar General. The function of the Registrar General is to only see whether the qualification of citizenship by operation of law is fulfilled at the time of application for registration of the birth of a newborn is made. He does not have any discretion on the matter.

Whether The Registrar General Committed An Error Of Law?

[32] This is the crux of the first ground raised by the applicants. It was submitted that the Registrar General committed an error of law by amending the status of citizenship when issuing the second birth certificate. The law is clear. The second birth certificate had to be issued on account of the original particulars in the register of birth in respect of the parents of the child being false. The action to amend the status of citizenship was made under sub-s. 27(3A) after an inquiry was held under sub-s. 37B(1) of the BDRA. The Registrar General was acting within his powers conferred upon him to maintain a register of births and to issue a certificate of birth based on correct particulars of the parents of the child. In the instant case, the identity of the biological parents of the child are not known.

[33] The action of the Registrar General was solely under the BDRA which provides for registration of births and deaths. It is the function of the Registrar General to issue a birth certificate. On the corrected particulars of this parents *ie*, "not known" the Registrar General carried out an inquiry under sub-s. 37B(1) of the BDRA. The first applicant and SS were heard in this inquiry. When the qualifications of citizenship by operation of law was not fulfilled the Registrar General amended the status of citizenship when issuing the second birth certificate. The Registrar General would be in dereliction of his function to issue a birth certificate with the status "citizen" when the qualifications of citizenship by operation of law are not fulfilled.

[34] The issuance of the birth certificate is provided for under s. 14 of the BDRA. The issuance of a certificate of birth is only provided under the BDRA and nowhere else – not even in the Federal Constitution. Thus, the issue of termination of citizenship is a non-starter and does not arise at all. The Registrar General was carrying out his function as provided by law and did not commit any error of law by his action of amending the status of citizenship under the BDRA.

Article 14(1)(b) Read With s. 1(a) Of Part II

[35] It was submitted that the child is a citizen by operation of law under art. 14(1)(b) read with s. 1(a) of Part II and s. 19B of Part III of the Second Schedule and a declaration is sought to that effect. Section 1(a) of Part II is in the following terms: every person born within the Federation of whose parents one at least is at the time of birth either a citizen or permanently resident in the Federation. The contention is that since the child is a newborn who has been abandoned by his mother at Shan Clinic & Maternity Centre it is presumed by virtue of s. 19B of Part II of the Second Schedule that the child is born to a mother permanently resident there. The applicants' reliance is on the decision, in particular, the wide interpretation given to s. 19B of Part III in *CCH & Satu Lagi lwn. Pendaftar Besar Kelahiran Dan Kematian, Malaysia* [2021] 10 CLJ 352.

[36] Section 19B of Part III of the Second Schedule provides a presumption of permanently resident in Malaysia as follows:

> For the purposes of Part I or II of this Schedule any new born child found exposed in any place shall be presumed, until the contrary is shown, to have been born there of a mother permanently resident there; and if he is treated by virtue of this section as so born, the date of the finding shall be taken to be the date of the birth.

[37] According to *CCH,* the words "found exposed in any place" was given a liberal interpretation in the following paragraphs of the judgment:

> [53] The operative words in s. 19B are "any new born child found exposed in any place". The purpose of this section, when read in context, must be to cover new born children who are left and discovered in a place without any trace of their biological parents. We take judicial notice of the harsh realities of life: this includes new born children left abandoned near dumpsites, baby hatches, public or school toilets, places of worship and so on. A literal meaning of "exposed" suggests a new born child who was "discovered" exposed at any of these locations.
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> [54] As such, *the broadest possible interpretation of the word "found exposed" is to accord it a meaning to include a child abandoned at the place of birth by the birth mother whose identity is unknown. The operative word "exposed" in s. 19B must therefore encompass the plight of abandoned new born children*, otherwise the overarching intent of preventing statelessness would be defeated or rendered illusory.

[38] In respect of burden of proof it was held in *CCH* that:

> [59] … Once it is shown or averred that a new born child is "found exposed" (or abandoned), two things are presumed, that is:
>
> (i) that the child is born to a mother who is permanently resident at the place where the finding was made (the *jus sanguinis presumption*); and
>
> (ii) the date of the finding is taken as the date of the birth.

> [60] Once s. 19B is invoked, any party challenging any of these presumptions must either show that (i) the child was not born of a mother permanently resident at the place where the new born child was found, or (ii) the date of the finding is not the date of the birth. It is really only a contest on the earlier which determines citizenship because of the wording of s. 1(a) which requires that a child born within the Federation to be born of at least either one parent who is either a citizen or, more important to this case, of a parent permanently resident in the Federation.

[39] In the instant case, according to the principles enunciated in the *CCH* case, it is the applicants who must first show that the child was abandoned at Shan Clinic & Maternity Centre. Once the fact of abandonment is established by the applicants only then does the burden shift to the Registrar General to rebut the presumption that has arisen *ie*, the child was not born of a mother permanently resident at the place where the newborn child was found.

[40] I found that the applicants had failed to clear the threshold by failing to show that the child was found abandoned at Shan Clinic & Maternity Centre for the presumption to arise. The applicants had submitted that the instant case is on all fours with the *CCH* case. The applicants in that case, as the applicants in this case, averred that they were informed that a newborn baby was abandoned at the hospital. The appeal, it is clear from the following words of the Federal Court, turned on the evidence of abandonment the burden of which was on the applicants:

> [58] *There is nothing in the evidence, as far as we have examined it, to suggest that the appellants were lying about the fact of abandonment.* According to s. 19B therefore, the burden of showing that the child's mother was not permanently resident at the place of finding rests on the respondent. Given that the child was born in the said hospital, surely the respondent has the means to verify from the hospital's admission records, the identity of the child's biological mother, if not the father. Therefore, as the record stands, the respondent has not been able to discharge that burden. *No affidavit has been deposed nor a modicum of evidence adduced to suggest that the narrative provided by the appellants is inherently incredible or even false or untrue.*
>
> [70] ... Further, the respondent did not directly address or respond to any of the positive averments made by the appellants regarding how the child was found abandoned, *thus leaving those averments admitted*.
>
> (emphasis added)

[41] I have examined the averments made by the first applicant and on behalf of the respondents. It is clear that the first applicant or SS have no knowledge of the alleged abandonment except what was told to them by Dr Shanmugam. The allegation of abandonment was disputed by the Registrar General. There was no affidavit filed by Dr Shanmugam who appears the only person who can shed light on the biological mother of the

child. Further, Shan Clinic & Maternity Centre revealed that there were no records of the birth of the child as all records in the clinic had been destroyed in floods during investigations carried out by the National Registration Department. Thus, the case is not on all fours with the *CCH* case. In the instant case, unlike the *CCH* case, the Registrar General disputed the fact of abandonment and did carry out investigations at Shan Clinic & Maternity Centre where the child was claimed to have been born.

[42] The fact of abandonment was not based on personal knowledge but of a third party, Dr Shanmugam who did not affirm any affidavit. Further, the Registrar General has provided the narrative that Dr Shanmugam is not a truthful person. Dr Shanmugam, had actually fabricated the information of birth stated in the document "Surat Pengesahan Kelahiran" dated 23 August 2005 and lied in Form JPN LM01 that the child was born by SS and he was the doctor in attendance.

[43] Further, Dr Shanmugam, also did not comply with s. 9 of the BDRA which imposes a statutory duty on him to inform the Registrar General of the particulars required to be registered concerning the newborn is found exposed which according to the *CCH* case includes abandonment at a hospital. Section 9 of the BDRA provide as follows:

> Where any living new-born child is found exposed, it shall be the duty of the person finding the child, and of any person in whose charge the child may be placed, to give to the best of his knowledge and belief to the Registrar, before the expiration of fourteen days from the date on which the child was found, such information of the particulars required to be registered concerning the birth of the child as the informant possesses, and in the presence of the Registrar to sign the register:
>
> Provided that the giving of information and the signing of the register by any one of the said persons shall act as a discharge of any duty under this section of any other of them.

[44] Instead, of complying with s. 9 of the BDRA, Dr Shanmugam did the opposite and suppressed the identity of the biological mother from the Registrar General. Dr Shanmugan's breach of his statutory duty and deliberate fabrication of documents together with the complicity of the first applicant to forward fabricated information in Form JPN LM01 shows that he is not telling the truth and had concealed the identity of the biological mother. He is clearly an untruthful, willing to lie of the birth of the child, and therefore his statement to the first applicant and SS cannot be believed. The fact of abandonment has not been proved for the presumption in s. 19B of Part III of the Second Schedule to arise.

[45] The Registrar General had therefore acted correctly in holding that the child was not a citizen by operation of law under art. 14(1)(b) read with s. 1(a) of Part II and s. 19B of Part III of the Second Schedule. The decision was not irrational and was one that a body similarly circumstanced would have made.

Article 14(1)(b) Read With ss. 1(e) And 2(3) Of Part II

[46] The applicants, in the alternative, submit that the child is entitled to citizenship by operation of law under s. 1(e) read with s. 2(3) of Part II of the Second Schedule as the child is not born a citizen of any other country. It was stressed that the sections are only concerned with place of birth and statelessness and does not refer to the child's lineage or *jus sanguinis*. It was, following the above, submitted that the only relevant question for the purposes of s. 1(e) of Part II is whether a child born in Malaysia has acquired citizenship of any other country within one year from the date of his or her birth. It was averred by the first applicant that the child was born in Malaysia and had not acquired citizenship of any other country until the age of 12 years when the second birth certificate was reissued to the child. The High Court case of *LKP & Anor v. Pendaftar Besar Kelahiran Dan Kematian, Malaysia* [2023] 3 CLJ 243 said to be similar to the facts of the instant case was cited in support of the submission made.

[47] The Registrar General on the other hand submitted that s. 1(e) of Part II of the Second Schedule embodies both *jus soli* (right of the soil) and *jus sanguinis* (right of blood) and that the latter criteria was not established by the applicants.

[48] It is trite that the child would be a citizen by operation of law if the qualifications specified in s. 1(e) of Part II of the Second Schedule are fulfilled. Section 1(e) state as follows:

> Every person born within the Federation who is not born a citizen of any country otherwise than by virtue of this paragraph.

Further, it is provided in s. 2(3) of Part II of the Second Schedule, that provide as follows:

> For the purposes of paragraph (e) of Section 1 a person is to be treated as having at birth any citizenship which he acquires within one year afterwards by virtue of any provision corresponding with paragraph (c) of that section or otherwise.

[49] I found that the child did not fulfil the qualifications of s. 1(e) read with s. 2(3) of Part II of the Second Schedule for the following reasons. Section 1(e) provides that two criteria must be fulfilled: (i) the person is born in Malaysia on or after Malaysia Day (the *jus soli* criteria); and (ii) the person is not born a citizen of any country (the *jus sanguinis* criteria). I am bound

by the Court of Appeal cases of *Lim Jen Hsian & Anor v. Ketua Pengarah Jabatan Pendaftaran Negara & Ors* [2017] 8 CLJ 412; *Than Siew Beng & Anor v. Ketua Pengarah Jabatan Pendaftaran Negara & Ors* [2017] 8 CLJ 16; [2017] 5 MLJ 66 and *Tan Soo Yin v. Registrar-General Of Births And Deaths, Malaysia* (dated 22 November 2022, unreported, Civil Appeal W-01(A)-548-10-2020) which held that the concepts of *jus soli* and *jus sanguinis* are embedded in s. 1(e) of Part II of the Second Schedule. In *Lim Jen Hsian* it was held as follows:

> [27] Article 14(1)(b) of the Federal Constitution encapsulates the requirement of citizenship by *jus soli ie*, by the place of birth; while s. 1(e) of Part II of the Second Schedule of the Federal Constitution ("not born a citizen of any country") encapsulates the requirement of citizenship by *jus sanguinis ie*, by blood or lineage.
>
> [28] Thus, it would appear that the second appellant would need to satisfy both the requirements of *jus soli* and *jus sanguinis* in order to fulfil the requirements of art. 14(1)(b) and s. 1(e) of Part II, Second Schedule of the Federal Constitution.

[50] The criteria of *jus sanguinis* in s. 1(e) of Part II of the Second Schedule is the only issue before me and I am guided by the decision of the Court of Appeal in *Than Siew Beng* where it was held as follows:

> [27] The contentious issue is in respect of the requirement of *jus sanguinis* in s. 1 (e) of Part II of the Second Schedule of the Federal Constitution as expressed by the phrase, "who is not born a citizen of any country". For the purposes of this requirement, **the material time to determine the status of the second appellant's lineage is at the time of his birth.**
>
> [35] A plain reading of s. 1(e) "was not born a citizen of any country" refers to the relationship of the second appellant to his biological and lawful parents at the time of his birth. The only available documentary evidence – the second appellant's birth certificate (exh. TSB6) contained no information pertaining to the biological parents and the relevant particulars were endorsed with "Maklumat Tidak Diperolehi".
>
> [36] Since the identity of the child's lawful and biological parents are unknown, it is not possible to determine the lineage of the second appellant that would enable the second appellant to be conferred citizenship by lineage *ie*, *jus sanguinis*.
>
> [37] Thus in our view, the second appellant has not fulfilled the requirement to be a citizen by operation of law within the meaning of s. 1(e) of Part II of the Second Schedule of the Federal Constitution.
>
> (emphasis added)

[51] The Court of Appeal *Tan Soo Yin* reaffirmed the legal position enunciated in *Lim Jen Hsian* and *Than Siew Beng* and said:

> [18] Thus, the fact the Appellant was born within the Federation only satisfies the requirement of *jus soli* and in the absence of the identity of the Appellant's biological parents, *jus sanguinis* is not satisfied and one cannot determine whether she is stateless for the purpose of paragraph 1(e) of Part II, Second Schedule of the Federal Constitution.
>
> [19] For completeness, we would also state that we agree with SFC in that paragraph 2(3) Part II Second Schedule of the Federal Constitution only operates to treat any citizenship which a person acquires within 1 year after his birth as a citizenship that he acquires at the time of his birth. In other words, the said provision operates as a presumption as to time of acquisition of citizenship, to treat any citizenship acquired within 1 year after birth as citizenship acquired at the time of birth.

[52] This then brings me to the burden of proof. The Court of Appeal in *Lim Jen Hsian* and *Than Siew Beng* held that the burden lies on the persons asserting that the qualification of citizenship by operation of law is satisfied. It suffices to reproduce the relevant paragraph in *Than Siew Beng* which state as follows:

> [29] It is a well-established principle of law that "he who asserts must prove". The burden of proof is on the appellants to establish a *prima facie* case on the balance of probabilities that the second appellant, "was not born a citizen of any country".

[53] In this regard, it is not sufficient to refer to s. 2(3) of Part II of the Second Schedule to merely say that the child has no citizenship of any country one year from the date of the birth of the child. That is not the purpose of the section. All that s. 2(3) does is to treat a person has having any citizenship at the time of birth which citizenship was subsequently acquired within one year from the date of birth either through: (i) any provision corresponding with s. 1(c) of Part II of the Second Schedule or (ii) some other means. This principle was established in *Tan Soo Yin* where the Court of Appeal established that sub-s. 2(3) of s. 1 operates as a presumption as to the time of acquisition of citizenship and to treat any citizenship acquired within one year after birth as citizenship acquired at the time of birth. Based on this reasoning, the sub-s. 2(3) of s. 1, Part II has no application in the instant case.

[54] In order to ascertain whether the applicants had discharged the burden that the child was 'not born a citizen of any country', it behoves on me to examine the facts and evidence of the case as disclosed in the affidavits filed. As already shown above, the evidence shows that the first applicant and Sheila have no knowledge of the biological parents of the child. They obtained possession of the child from Dr Shanmugam who had falsified documents to be used to register the child. No evidence of lineage of his parents was produced. Thus, the applicants had failed to prove that at the

time of his birth, the child, based on his lineage had not acquired citizenship of any country. In the circumstances, the requirement of *jus sanguinis* is not satisfied. The claim under para. (e) s. 1 of Part II of the Second Schedule fails.

Conclusion

[55] In the premise of the foregoing, the qualification for citizenship by operation of law has not been met and accordingly, the application is dismissed with no order as to costs.